BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	**CC Docket No. 96-45**
	)	

LIMITED PETITION FOR RECONSIDERATION OF AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute (API), by its undersigned attorneys and pursuant to Section 1.429 of the rules of the Federal Communications Commission (the Commission), hereby respectfully seeks limited reconsideration of the Commission's First Report and Order, released May 8, 1997 and published June 17, 1997.[1] This Petition is limited to the Commission's findings, in Paragraph 851 of that Order, that "it will serve the public interest to allow telecommunications carriers and providers to make changes to existing contracts" to recover universal service contributions. Given the equities, prior Commission policy, and the law, the Commission should not authorize carriers to abrogate existing contracts with customers.

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[1] *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, First Report and Order, FCC 97-157 (rel. May 8, 1997) (*Universal Service Order* or *Order).*

I. PRELIMINARY STATEMENT

API is a national trade association representing approximately 300 companies involved in all phases of the petroleum and natural gas industries, including exploration, production, refining, marketing, and transportation of petroleum, petroleum products, and natural gas. Among its many activities, API acts on behalf of its members as spokesperson before federal and state regulatory agencies. The API Networks and Technology Committee is one of the standing committees of the organization's Information Systems Committee. The Networks and Technology Committee evaluates and develops responses to state and federal proposals affecting telecommunications facilities used in the oil and gas industries.

API did not file comments in this proceeding, although it has participated extensively in the Commission's related *Local Competition* and *Access Charge Reform* rulemakings. Nonetheless, API members are directly affected by rules established in this proceeding. API now files this limited Petition for Reconsideration to urge the Commission to preserve the legitimate business expectations of parties to negotiated contracts for telecommunications services. The Commission should preserve those legitimate and reasonable expectations by not authorizing carriers to abrogate existing contracts between carriers and customers.

II. CONTRACT ABROGATION ALLOWS A CARRIER TO INCREASE A CUSTOMER'S RATES EVEN AS IT RETAINS ACCESS SAVINGS

Contracts between carriers and customers for telecommunications services include a variety of terms that reflect the parties' best efforts to accommodate uncertainty. For example, while a contract may specify a number of Minimum Annual Commitments (MACs), it may also include provisions applicable when MACs are unmet or exceeded. Regulatory action creates additional uncertainties that must be accommodated. Execution of the agreement reflects the parties' willingness to accept the risks and benefits contained therein, including the risk of new business expenses.

Though phrased to suggest that the Commission is authorizing only minor tinkering, the *Order* allows carriers to abrogate negotiated contracts, since price is an essential contract term. By allowing carriers to abrogate contracts, the *Order* undermines business expectations, contrary to established Commission policy, as discussed below.

Moreover, the "contract adjustments" that the *Order* contemplates distort both the process and the result. First, those "adjustments" exclusively benefit the carrier even though both parties accepted the risks associated with long-term contracts. And, second, although carriers will incur additional expense as a result of the contribution requirements established in the *Universal Service Order,* they also will enjoy savings due to recently-ordered access charge reductions and, depending upon the carrier identity, rate

restructuring.[2] The *Order* fails to acknowledge these offsetting benefits. Consequently, in the absence of carrier flow-through obligations, customers are subject to rate increases even as carriers retain rate savings. This inequitable result surely cannot be reconciled with protecting the public interest in just and reasonable rates.

III. THE DECISION CONFLICTS WITH WELL-ESTABLISHED COMMISSION POLICY TO PRESERVE REASONABLE COMMERCIAL EXPECTATIONS IN NEGOTIATED AGREEMENTS

The Commission has previously recognized that it is in the public interest to preserve reasonable commercial expectations in negotiated service agreements. Indeed, in the first exercise of the forbearance authority granted the Commission under the Telecommunications Act of 1996, the Commission sought to ensure that these legitimate business expectations would be preserved:

> Complete detariffing would also further the public interest by eliminating the ability of carriers to invoke the "filed-rate" doctrine. . . .[T]he filed rate doctrine provides carriers with the ability to alter or abrogate their contractual obligations in a manner that is not available in most commercial relationships. . . . Accordingly, by permitting carriers unilaterally to change the terms of negotiated agreements, the filed rate doctrine may undermine consumers' legitimate business expectations. . . . Thus, *eliminating*

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[2] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges,* CC Docket Nos. 96-262, 94-1, 91-213, and 95-72, First Report and Order, FCC 97-158 (rel. May 16, 1997) and Errata (rel. June 4, 1997) (*Access Reform Charge Order)* and *Price Cap Performance Review for Local Exchange Carriers,* CC Docket No. 94-1, Fourth Report and Order, and *Access Charge Reform,* CC Docket No. 96-262, Second Report and Order, FCC 97-159 (rel. May 21, 1997) (*Price Caps Order).*

> *the filed rate doctrine in this context would serve the public interest by preserving reasonable commercial expectations and protecting consumers.*[3]

The *Universal Service Order* makes no effort to reconcile these public interest findings with its conclusion that "[u]niversal service contributions constitute a sufficient public interest rationale to justify contract adjustments."[4]

The *Order* states that the assessment on carriers of a new contribution requirement creates an expense or cost of doing business that was not anticipated at the time contracts were signed. It therefore "would serve the public interest to allow telecommunications carriers and providers to make changes to existing contracts for service in order to adjust for this new cost of doing business."[5] Despite its careful and euphemistic phrasing, the *Order* grants carriers the right to unilaterally alter or abrogate their contractual obligations, thereby undermining customers' legitimate and reasonable business expectations.

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[3] *Policy and Rules Concerning the Interstate, Interexchange Marketplace* and *Implementation of Section 254(g) of the Communications Act of 1934, as amended,* CC Docket No. 96-61, Second Report and Order, FCC 96-424 (rel. Oct. 31, 1996) (*Detariffing Order) stayed pending judicial review* at ¶55 (footnotes omitted; emphasis added). In contracts between carriers, the Commission has held that unilateral changes that alter material terms and conditions of long-term service arrangements are reasonable only if justified by "substantial cause." *Id.* at Fn. 162.

[4] *Universal Service Order* at ¶ 851.

[5] *Id.*

Authorizing carriers to abrogate long-term agreements to allow recovery of future expenses represents a significant departure from the Commission's previous policies and findings. While the Commission may modify its policies, it is a fundamental tenet of administrative law that an agency explain such changes. The *Universal Service Order*, however, lacks this requisite explanation. Instead, it relies on conclusory recitals that contributions "constitute a sufficient public interest rationale" and that "it would serve the public interest" to allow carriers to abrogate negotiated contracts. These conclusory statements appear to conflict with prior explicit findings and policy positions by the Commission. This apparent conflict, in conjunction with the discriminatory effect on customers who will be subject to rate increases even as carriers retain rate savings, warrants Commission reconsideration.

IV. THE COMMISSION LACKS THE AUTHORITY TO ABROGATE NEGOTIATED CONTRACTS TO ALLOW CARRIER RECOVERY OF UNIVERSAL SERVICE CONTRIBUTIONS

The *Order* identifies a single authority supporting its decision to allow contract abrogation: *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956). That case, however, is inapposite. The *Sierra-Mobile* doctrine, as it has been developed in a line of cases, applies to contracts between carriers; it apparently has not been construed to apply to contracts between carriers and customers.[6]

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[6] *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*). While the *Sierra-Mobile* doctrine perhaps should be extended to apply to

Under this doctrine, the Commission can modify the terms of an *inter-carrier* contract only where, after investigation, it determines the contract terms would adversely affect the public interest. Significantly, the *Sierra* Court distinguished between the protection of the public interest and the private interests of the utilities, observing that "it is clear that a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility."[7] Even if the *Sierra-Mobile* doctrine were applicable, the Commission's conclusory recitals bear no relation to the carrier-specific, fact-based investigation contemplated under that doctrine.

In paragraph 547 of the *Universal Service Order* the Commission rejects proposals to abrogate carriers' existing service contracts with schools and libraries. The paragraph explains that the proposals would be administratively burdensome and would create uncertainty, considerations which are equally applicable to the abrogation of contracts between carriers and customers. Two additional reasons warranting rejection of the proposals also are equally applicable:

> In addition, *we have no reason to believe that the terms of these contracts are unreasonable*. Indeed, abrogating these contracts or adopting these other proposal would not necessarily lead to lower

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contracts between carriers and customers, those contracts have traditionally been reviewed pursuant to the "filed-rate" doctrine, which provides that tariffed rates, terms, or conditions "trump" the rates, terms, or conditions contained in customer-specific contracts. *See Detariffing Order* at Fn. 122.

[7] *Sierra* at 355.

> pre-discount prices, due to the incentives the states, schools, and libraries had when negotiating the contracts to minimize costs. Finally, we note *there is no suggestion in the statute or legislative history that Congress anticipated abrogation of existing contracts in this context.*[8]

Similarly, there is nothing to suggest that the terms of existing negotiated contracts are unreasonable. It is mere speculation that, once carriers incur their new universal service obligations, those terms will be unreasonable; indeed, once offsetting rate savings are considered, carriers are likely to be in a more favorable position than customers.

Nor is there any suggestion in either the statute or legislative history that Congress anticipated abrogation of existing contracts to facilitate carrier recovery of universal service contributions. Because Section 254 explicitly entitles schools and libraries to discounts on telecommunications services, the Commission has some basis to conclude that it would be appropriate to apply those discounts to existing service agreements.[9] This action, moreover, benefits customers by further lowering rates. Commission action with respect to recovery of universal service contributions, however, harms customers by allowing carriers to *increase* rates and it does so in the absence of any explicit or implicit statutory authorization.

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[8] *Universal Service Order* at ¶ 547 (emphasis added).

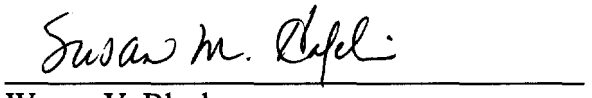
[9] *Universal Service Order* at ¶ 549.

V. CONCLUSION

API urges the Commission to preserve parties' legitimate and reasonable expectations by not authorizing carriers to abrogate existing contracts between carriers and customers, consistent with the views expressed herein.

Respectfully submitted,

AMERICAN PETROLEUM INSTITUTE



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